City of Lafayette
City Council Special Meeting

MINUTES

Lafayette Community Center – Sequoia Room
500 St. Mary's Road, Lafayette, California

November 10, 2008
6:30 p.m.

1. CALL TO ORDER

Mayor Anderson called the meeting to order at 6:30 p.m.

2. ROLL CALL

Present: Council Members: Mayor Anderson, Councilmembers Andersson, Anduri and Federighi

Absent: Vice Mayor Tatzin

Staff: Steven Falk, City Manager; Ann Merideth, Community Development Director; Tony Coe, City Engineer; Mala Subramanian, City Attorney

3. ADOPTION OF AGENDA

ACTION: It was M/S/C (Federighi/Andersson) to adopt the agenda. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent:Tatzin).

4. PUBLIC COMMENTS

Convene Redevelopment Agency

5. CLOSED SESSION

A. Conference with Legal Counsel – Anticipated Litigation: Significant exposure to Litigation pursuant to Government Code section 54956.9(b) (1 Case)

Adjourn Redevelopment Agency

6. ADJOURNMENT

ACTION: It was M/S/C (Anduri/Federighi) to adjourn to the Special City Council Meeting at 7:00 p.m. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent: Tatzin).

APPROVED:

_____
Mike Anderson, Mayor

ATTEST:

_____
Joanne Robbins, City Clerk

City of Lafayette
City Council Regular Meeting

MINUTES

Lafayette Community Center – Manzanita Room **November 10, 2008**
500 St. Mary's Road, Lafayette, California **7:00 p.m.**

1. CALL TO ORDER

Mayor Anderson called the meeting to order at 7:00 p.m.

2. ROLL CALL

Present: Council Members: Mayor Anderson, Councilmembers Andersson, Anduri and Federighi

Absent: Vice Mayor Tatzin

Staff: Steven Falk, City Manager; Tracy Robinson, Administrative Services Director; Niroop Srivatsa, Planning & Building Services Manager; Mike Hubbard, Police Chief; Roxanne Gruenheid, Police Lieutenant; Cathy Surges-Moscato, Community Services Officer; Christine Sinnette, Senior Planner; Mala Subramanian, City Attorney; Joanne Robbins, City Clerk

3. PLEDGE OF ALLEGIANCE - led by Mayor Anderson.

4. ADOPTION OF AGENDA

ACTION: It was M/S/C (Anduri/Andersson) to adopt the agenda. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent: Tatzin).

5. REPORT ON CLOSED SESSION

City Attorney Subramanian reported that no reportable action had been taken in Closed Session.

6. PUBLIC COMMENTS

GORDON MATTONEN reminded the public of the City ordinance prohibiting certain signage on public property during elections, and he voiced concerns with City enforcement of signage.

7. PRESENTATIONS

8. OLD BUSINESS

A. Tracy Reilly and Kim Tejada, Crime Prevention Commissioners Introduce Ordinance 579 repealing Chapter 56-4 of the Contra Costa County Code Entitled "Solicitors and Peddlers" and adding Chapter 4-4 of the Lafayette

Municipal Code Entitled "Solicitors, Peddlers and Canvassers"
Recommendation: Discuss and consider Ordinance 579.

Tracy Reilly, Crime Prevention Commissioner, highlighted criminal records and criminal activity of peddlers and solicitors, the consequences for peddling which are equivalent to parking tickets, and noted there are currently no provisions for those who peddle where "no solicitation" signs are posted. The Crime Prevention Commission has been working over the last two years for a feasible solution that would help prevent crime and provide the Police Department with tools in their law enforcement activities.

She proposed the following:

1. A commercial peddler must get a permit at the Lafayette Police Department versus the County offices in Martinez. Police would conduct a minimal background check to include a DMV check, a warrants check which would reveal restraining orders, parole and probation violations, and 290 registrations (sex offenders). They would also conduct a names check. They would also be given a list of rules, which she briefly described.
2. Peddlers would be asked to fill out an application. They would be asked if they had any felonies or misdemeanors. She noted that based on the August Council meeting, the Commission discussed the term, "moral turpitude" and they decided to strike out that terminology because it does not adequately capture the entire class of criminal activity that should be considered when granting the potential ordinance.
3. Regarding consequences for soliciting without a permit, the first incident would be an infraction, second would be a misdemeanor.
4. In response to the recidivism question from the August meeting, Ms. Tejada has a significant background in law enforcement, is very familiar with the disposition of many cases in courts, and often a person will get arrested and the original charge gets reduced to a lesser charge. The statistics provided do not include the persons that are paroled, they do not speak to the magnitude of people that are currently on probation and they also do not talk about those with drug charges.
5. If passed, the Commission plans to work with the Police Department to educate citizens on how best to protect themselves and also conduct an extensive campaign about "no soliciting" signs.

In summary, Ms. Reilly said the Commission started down the path from the murder of Ms. Fiori on Moraga Boulevard by an out-of-state magazine sales person and during this process, they put together a fair and comprehensive plan that will protect citizens and provide an opportunity for people to legally solicit their products in the City.

Mayor Anderson thanked Ms. Reilly and the Commission for their participation in review of the ordinance.

Councilmember Anduri referred to removing the "moral turpitude" language and he questioned if it was due to being ambiguous and therefore difficult for the Police Department to determine whether a crime is a crime of moral turpitude. Ms. Reilly said yes, in going back to the analysis contained in the packet, the Commission found it was vague. In court cases cited, there is truly not a list of crimes that fall under moral turpitude and no where to go to find such a list. It would be very difficult for a Police Department to have to research each person to determine whether or not they fell under that category.

Councilmember Andersson questioned whether the City could identify crimes which the City thinks should fall under that term and then simply define those in the ordinance. He said he was concerned of the broadness in the way it was being proposed, which he felt was an inappropriate solution.

Ms. Reilly said it is for persons who have had misdemeanors and felonies, but acknowledged it was very broad. She said the Commission was forced to research the term and it was very complicated. There was no list and the Commission did not feel it had the authority to make a list. And, this is why there is no strong court precedence on this.

Councilmember Andersson said there was a comment that it was difficult to get statistical evidence on recidivism, but the Commission did provide tables on recidivism which provide a rather dramatic statistical evidence which is consistent across the tables. In the first three years, the recidivism is 60%. When up to six years, it adds one-eighth of a percent to that; to nine years, it adds another .3%. He felt that if there is recidivism, it is extremely likely that it will happen in a couple of years, and then it drops off dramatically. The question the Council submitted to the Commission was based on the question of whether there should be some time gap, and he was not clear why there should be no time limit. It seems that the statistics cited are quite clear that there is a dramatic drop-off after a few years, and he was not sure of what the basis is for saying there should be no time limit at all.

Ms. Reilly said information was provided from the Department of Corrections to the City Attorney's office, and then it was provided to the Commission. Once a person falls off parole, they are no longer tracked and they could easily offend. She said the Commission questioned what timeframe to allow, and after debate, they did not feel comfortable with setting a time table. However, if the Council wanted this amended to a timeframe it feels comfortable with, this could be done.

Councilmember Anduri referred to the draft text of the ordinance; 4-412 (c) and (d) Exemptions; and asked why distributing handbills would not be subject to the regulations set forth in the chapter. He said they are restricting it to the hours of 9:00 a.m. and 6:00 p.m., and questioned if the intent that handbills can be distributed after 6:00 p.m. City Attorney Subramanian said this has not changed; this is the intent if one would drop it off without knocking on the door. The time restrictions would not be an issue; however, this could be altered and have the language match subsection (b).

Councilmember Anduri referred to the last sentence of subsection (d); "Additionally, solicitation of donations made incidental to such canvassing is excluded from the permit requirements of this chapter", and he said he could see someone initiating a discussion and then morphing into a solicitation. City Attorney Subramanian said the intent is that there have been some cases that allow this, so if the person isn't truly coming just to get money as opposed to a discussion about voting for a candidate and incidentally you get the donation; it is intended not to require a permit. So, they could comply with some of the case law.

Councilmember Anduri said the violation and penalties section states that, "if every activity constitutes a nuisance and a separate violation of this chapter for each and every day for such activity is so engaged in or is carried on" and "in addition, any person who violates provisions of this chapter shall be guilty of an infraction for the first violation and a misdemeanor for a subsequent violation thereafter." He said if someone gets stopped and asked for their permit, and they don't have their permit and then they go to the next block and start in again, this does not appear to be a separate violation if it occurs on the same day.

City Attorney Subramanian said she would read it, assuming they were given the infraction citation and then they continue to solicit, and the second violation would be a misdemeanor. However, she can clarify this, for "each and every incident" as opposed to "day."

Councilmember Anduri said the first time the item came to the Council was August 11th or 12th and he questioned if Ms. Reilly attempted to bring the item to the Council prior to that date. Ms. Reilly said no, they held joint meetings to discuss the subject.

Mayor Anderson opened the public hearing.

MICHAEL OLSON asked the Council not to allow soliciting at all in town. He believed there is no need for sales of door-to-door products these days, said he does not want people coming to his neighborhood where he, his and other children and his wife selling anything, as there is no reason for it. He also did not believe that it is the community's charge to look after the welfare for those who may have committed repetitive crimes.

PATTY BATTERSBY, Happy Valley Improvement Association and member of the Safety Committee, said the Association Board lends its support for the ordinance which they believe is strict. She is very much in favor of it, spoke of the petition submitted and believes that people want to be protected from those with misdemeanors and felonies. She agrees with Mr. Olson's comments about products for sale.

Councilmember Anduri questioned and confirmed that Ms. Battersby spoke of the magazine sales by young people who mislead people with their identity and association, and that the exemption covers everybody. He also noted that those cited with a misdemeanor would not be able to solicit and he questioned her feelings on someone for instance being cited for not removing their garbage cans. Ms. Battersby believed the real danger is something happening with that one out of a hundred and she did not believe such businesses were viable and real.

CHRISTINE WANG thanked Tracy Reilly for her work on the subject, agreed with Mr. Olson and not wanting solicitation in the City and spoke of her experience viewing and speaking with young people after their being offloaded into the neighborhood to sell magazines.

Councilmember Federighi noted the ordinance would not ban all solicitors, but they would simply need a permit. Ms. Wang supported Mr. Olson's position that there not be any solicitation of this kind allowed in the City.

WENDY MCCLAIN said she was one of many homes burglarized this summer, noted there was someone home at every house in their cul-de-sac, supported re-visitation of the ordinance, and did not want people coming to her home selling goods. She did not see any benefit for the City to allow peddling and wanted an assurance that her family is safe.

Councilmember Federighi questioned whether or not enforcement would occur if someone had "no solicitation" signs at their doors. City Attorney Subramanian said yes, it is already contained in the ordinance under Section 4-409 and it would be staff's recommendation that anyone not wanting solicitors come to their door place a sign in front of their homes, and this would be prohibited regardless of someone having a permit.

Councilmember Andersson questioned if there were legal bars to the City to ban solicitation outright, and Ms. Subramanian said yes. The Crime Prevention Commission looked into this

and asked staff to determine whether a "no knock" ordinance could be adopted, and she believes this could be legally challenged. She did not see such an ordinance to be easily defended because signs can be placed stating "no solicitors."

TASHA MCNAMARA said she has had various salespeople come to her house intimidating, lying, cursing to neighbors and to her, and agrees that if it were her choice, she would not want anyone coming to her home while her two children are playing in the front yard. She believes the ordinance is a step in the right direction but voiced concern as to how to enforce it, wants there to be consequences for those who do not have permits, but worried this is just not enough and preferred not to have solicitors at all.

GABRIEL FROYMOVICH said he did not feel that Lafayette has an obligation to play a role in assisting rehabilitative criminals, as the criminal system does create mechanisms to having their criminal records expunged in order for people to obtain permits. However, he believes the City should try to pass the ordinance in a defensible way as soon as possible. He cited the City of Atherton's ordinance which is similar, believed senior citizens were at particular risk and spoke of an incident of intimidation. He believed the matter is a public safety issue, said there is an allowance for the City Council to pass law that would not require the 30 days usually required for enactment and asked that the ordinance be adopted and enacted as soon as possible.

Councilmember Andersson quoted the Municipal Code regarding removing trash cans after the day of pick up and asked if someone cited for this would disqualify someone obtaining a permit. Mr. Froymovich believed the ordinance could be revised to allow that sort of infraction, but the Commission ran into the many laws in California which states solicitation cannot be banned outright. He did not believe solicitation brings enough of a positive benefit to the community that we need to worry about those cited with not bringing their trash cans in, but said the public safety issue must be addressed.

KELLY WOOD said she was involved with the meetings with police after the murder, was told that people should never open their doors to people who did not have an appointment, but she questioned why the City would allow people then to walk around town and do this. She said it would be her choice to not allow solicitation at all, as people do not want dangerous people in their neighborhoods.

LYNN HIDEN thinks it is important to remember that streets are public and not private and the public has a right to be there, has a right to walk down any public street, supports some sort of a solicitation ordinance and said she was burglarized several years ago. On the flip side of the issue, she discussed her promotion of City Council candidates going door to door where residents have welcomed them. She discussed her door to door promotion of the police measure and neighborhood petitions and believed if the City is too strict, this freedom could disappear.

Mayor Anderson closed the public comment period.

Councilmember Andersson said he is just as annoyed by solicitors, but there is the question of safety. Regarding safety, if the ordinance is enacted, it would make sense to eliminate those who would be dangerous. He said regarding all having records of misdemeanors and felonies should be banned, there are some cases where this does not fit and it is easy to err on the side of caution; however, if by doing this eliminates an entire class of people, this does not make sense. Associated with this is the legal question that there must be a nexus as to what one is doing and what one is trying to accomplish. So, the question is how the City legally excludes

them. He believed the classes of crimes might be reviewed to identify the dividing line between dangerous people and those who are not.

Councilmember Anduri questioned if Councilmember Andersson wanted to look at the type of misdemeanor as well as the time period, and Councilmember Andersson wanted review of the time period. He read the statistics and understands there is uncertainty with how statistics are reported, but he suggested this be looked at more deeply.

Councilmember Anduri said he wanted to balance his personal feelings on this with his rational side. Personally, he did not like anyone coming to his door and he would prefer to have an ordinance that bans anyone coming to doors. He would also like to discuss changing 4-421 (c) so that it is subject to the time regulation, and would like to consider deleting the final sentence of 4-412 (d) that allows solicitation that are incidental to canvassing.

City Attorney Subramanian said staff inserted this sentence because of case law, but she could confirm this at the next Council meeting.

Councilmember Anduri said regarding his rational side, he would like the Commission to review excluding someone coming door to door who has a record, and had no trouble with there not being a time period. If someone committed a crime of moral turpitude, then he did not see any reason for them to being able to solicit door to door.

Councilmember Federighi said the Council initially asked the Commission to look at time periods. The Council was somewhat concerned about moral turpitude which is vague, and ended up with something that is not so vague but sweeps a much wider net. She would not object to going back on the other hand. She also was not certain how much the ordinance would limit opportunities for those who have committed an infraction.

Mayor Anderson said he would like to move ahead on the ordinance, and believed it was like splitting hairs. Regarding misdemeanors being applicable, someone must actually be convicted of this and he did not see how anyone would be pointed at people to have someone arrested for not taking his/her trash cans in. He felt it was somewhat like a self-limiting piece here that we have to acknowledge. He did not believe police would spend the time dealing with minute infractions under the ordinance and because of this, if we can get better language on the three different sections Councilmember Anduri pointed out, the ordinance is strong. He did not believe a lot would be gained by having the Commission continue to review the matter further. He suggested some interpretation be given on the suggestions by Councilmember Anduri from the City Attorney, to return the ordinance for a first reading and then start moving toward adoption.

Councilmember Andersson said he believed the ordinance was overly broad; that without some kind of distinction that indicates certain people to be excluded, there is some reasonable nexus to a safety issue.

Councilmember Federighi referred to corrections to Section 4-412 (c) to add the words, "subject to the regulation as set forth in this chapter" and suggested looking at the possibility of deleting the last sentence of 4-412 (d). She questioned whether to change the word in Section 4-413 from "each and every day" to "each and every incident." Councilmember Anduri said he believes the City did want to capture more than one incident in a single day.

Councilmember Federighi said she was sympathetic to Councilmember Andersson's concerns, but she was not sure what the overall impact would be. She knows the Commission made a

diligent attempt to try to determine what would be a good time and to define crime, and the research into moral turpitude.

Councilmember Anduri questioned if such ordinances discourage all sources of solicitors, and questioned experiences in other cities. Chief Hubbard said given his experience, the majority of the peddler solicitor permits were issued for roadside sales for fruits and vegetables or Christmas trees in the past. He said locally, Orinda just adopted a similar ordinance and there has not been any feedback due to its newness, and the City following the County's ordinance has not been adequate.

ACTION: It was M/S/C (Federighi/Anduri) to direct staff to make the corrections as stated and return the ordinance to the City Council at the November 24, 2008 Council meeting. Vote: 3-1-1 (Ayes: Anderson, Anduri, Federighi; Noes: Andersson; Absent: Tatzin).

B. Niroop Srivatsa, Planning & Building Services Manager

1. **Palos Colorados Precise Development Plan: Compliance with the conditions in the Settlement Agreement relating to visual impact**
   Recommendation: Authorize staff to forward comments to the Moraga Planning Commission.

Planning and Building Services Manager Niroop Srivatsa said the purpose of the review is to provide comments to the Moraga Planning Commission on the project's compliance with the settlement agreement conditions. She said the conclusions that staff made is that the proposed house on Lot 106 will be visible from the BART station. Richfield Development has provided a landscape mitigation plan and has shown that in 10 years or more, the house will be fully screened from public view. She noted that it is important to ensure that the screening is permanent and if properties change hands, future property owners could not cut trees or add second stories to the single-story residences listed in the settlement agreement. In order to ensure the conditions are met, staff is suggesting four conditions to be passed onto the Moraga Planning Commissions which would be incorporated into the Precise Development Plan.

Ms. Srivatsa reported that the City received a letter from Richfield's attorney, stating the conditions were onerous and they believed they had already met the terms of the settlement agreement. She and the City Attorney discussed the matter, were unable to reach the Town of Moraga staff, but they hoped to arrive at a reasonable solution to the problem to protect Lafayette's views from the BART station, while at the same time, not restricting the lots to the level that is cited in the conditions.

City Attorney Subramanian said she spoke with the applicant's attorney regarding the letter and conditions. The attorney indicated that she did not have authorization to negotiate the conditions because her client was out of the country and indicated strongly that she felt all of the conditions were not in compliance with the settlement agreement. They discussed the need to work with Moraga to determine what their terms and general conditions are.

Ms. Srivatsa said staff would like to know the Council's position on the conditions as to whether they should be strengthened or weakened in order to further the work with the Town of Moraga and Richfield Development.

Mayor Anderson said he visited the BART station, looked at Lot 106 and was shocked at how visible it was, while the photo-simulations indicated it could not be seen. He has a great deal of concern with all of the lots identified and he believed the Council should stand firm on the

conditions as written. He questioned next steps after this meeting. Ms. Srivatsa said that the City has not come to a meeting of minds with Moraga or Richfield but hope to this week. Staff could inform the Town of Moraga that the matter would return to the Council the second meeting in November for the Council's authorization to forward it to the Planning Commission, but was not sure this would be too late, as Moraga is expected to act on the application. If direction is given this evening, she suggested the Council appoint a subcommittee to work with staff in case staff is not able to return to the Council. And, that the subcommittee work with Moraga and Richfield to arrive at a solution.

Councilmember Federighi said she also visited the BART station, agreed the Lot 106 home was very visible, and landscaping may not make it as visible in the future. She referred to the letter, said it was addressed to the Moraga Planning Director, and she questioned Richfield's response. Ms. Srivatsa said the letter in the packet was sent prior to Moraga preparing the photo-simulations and before they story-poled the property. It was prepared when the Council first reviewed the Precise Development Plan in September, and as a result of the letter, Richfield asked for a meeting with Lafayette and Moraga to discuss comments. Then, they agreed to story pole Lot 106 again. She said the letter received today is in response to the most recent staff report.

Councilmember Federighi voiced support for the City's requests; however, she believed the City's powers may be limited.

Councilmember Anduri strongly supported the conditions and said he was very disturbed by the Richfield attorney's letter regarding muted house colors and landscaping as providing screening. Councilmember Federighi voiced support for imposing the stated conditions.

Councilmember Andersson referred to condition 1 which asked that the landscape mitigation plan be incorporated into the Precise Development Plan and he questioned whether it already accompanied the plan. Ms. Subramanian said she believes staff originally thought it had been submitted as part of the plan application, but she confirmed it was submitted as part of the photo-simulation in late October.

Councilmember Andersson referred to condition 2 which relates to installation of trees. The applicant's response is for trees just on lot 106, which he felt makes sense and is a reasonable modification. Ms. Srivatsa referred to LMP-1; the site plan and landscape mitigation plan and said the trees on Lot 106 will not be sufficient to screen the views from the BART station, but rather the trees north of the road in the open space area would better screen the house. The City Attorney and she discussed this and recognized that it may be difficult to plant trees on Lot 106 before the home is built because of grading issues. But certainly, the trees north of the street can be planted in the open space area. She said when subdivision improvements are completed the street trees could be planted in conjunction with those improvements. And, staff was going to cite the tree numbers that are to be planted ahead of time.

Councilmember Andersson said there are also a number of lots on the ridge to the east which break the horizon and he questioned if there was proposed mitigation for these, as well. Ms. Srivatsa said those lots are not governed by the settlement agreement, but are part of the general development plan conditions. The last comment in the staff report points out that the homes do break the horizon, but it is up to Moraga to find them consistent or not.

ACTION: Mayor Anderson confirmed direction to staff was to maintain conditions as proposed and that a Council subcommittee be appointed consisting of Councilmember Andersson and Mayor Anderson.

Convene Redevelopment Agency

ACTION: It was M/S (Federighi/Anduri) to convene the Redevelopment Agency meeting. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent:Tatzin).

2. **Lafayette Residential Partner's Request to Transfer the Phase III Property and the Town Center Development Agreement to KB Home South Bay, Inc.** Recommendation: Adopt Resolution 2008-047 approving Lafayette Residential Partner's request to transfer the Phase III property and the Town Center Development Agreement to KB Home South Bay, Inc.; the transfer to become effective upon: (1) KB Home's execution of an assignment and assumption agreement in a form approved by the City; and (2) the transfer of the Property to KB Home prior to the expiration of the Development Agreement.

Councilmember Andersson recused himself from participating in the matter and left the Chambers.

Ms. Srivatsa said the Town Center Development Agreement requires that prior to the sale of one of the phases, the original property owner Lafayette Residential Partners (LRP) must bring the request to sell the property to the City Council for review and approval. There are four conditions the sale/potential buyer must meet. The conditions include business experience, the agreement to enter into a written assumption agreement agreeing to be bound by the terms of the Development Agreement; that there will not be a substantial delay in the project as a result of transfer, and that the developer is not in material breach with respect to the obligations of the development agreement. LRP has submitted a request to have Town Center Phase III be transferred to KB Homes South Bay. The staff report examines KB's experience and its willingness to proceed with the project, and finds that KB meets the four standards. Therefore, staff is recommending the Council adopt Resolution 2008-047 approving LRP's request to transfer Phase III to KB Homes. She noted representatives were present to answer questions.

David Bowie, Attorney representing LRP, said they processed a request to do the transfer and asked the Council to adopt the resolution, as recommended.

There were no public comments.

Councilmember Federighi supported the request, said the development agreement has been reviewed at great length and she made a motion.

ACTION: It was M/S/C (Federighi/Anduri) to adopt Resolution 2008-047 approving Lafayette Residential Partner's request to transfer the Phase III property and the Town Center Development Agreement to KB Home South Bay, Inc.; the transfer to become effective upon: (1) KB Home's execution of an assignment and assumption agreement in a form approved by the City; and (2) the transfer of the Property to KB Home prior to the expiration of the Development Agreement. Vote: 3-0-1-1 (Ayes: Anderson, Anduri, Federighi; Noes: None; Recuse: Andersson; Absent: Tatzin).

Councilmember Andersson returned to the Chambers to participate in the remainder of the meeting.

Adjourn Redevelopment Agency

ACTION: It was M/S/C (Federighi/Anduri) to adjourn the Redevelopment Agency meeting. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent: Tatzin).

9. STAFF REPORTS

10. PUBLIC HEARINGS

A. Christine Sinnette, Senior Planner

Appeal by Richard Holt of the Planning Commission denial of HDP47-07 and V17-08 for a request for a hillside development permit (HDP47-07) and variances (V17-08) to build a new two-story single family residence on a lot located at the intersection of Sierra Vista Way and Sessions Road (Tract 5332 Lot 66). APN 2332-052-019

Recommendation: Accept public testimony and consider the recommendations of the Planning Commission and staff. Continue the hearing to the December 8th meeting.

Planning and Building Services Manager Niroop Srivatsa noted that she, the City Attorney and Senior Planner Christine Sinnette would present the item. Staff is requesting the Council take public testimony and continue the matter to the December 8th meeting for more discussion. She said it was not often that a staff recommendation differs from the Planning Commission and this is the case in this application. Staff has based its recommendations on the fact that the project has gone through several revisions and the result is a house that staff believes will not impinge on the privacy of the adjacent neighbor to the east. The house has been reduced in size from the original hearing and the southern edge of the garage of the proposed project will be located 11 feet north of the rear of the garage on the neighbor's property. The house will be set back 15 feet from the eastern property line which will allow for a 20-foot minimum separation between the two houses which is required in an R-10 zone. After review of the revised proposal, staff believes it can make the findings for both the Hillside Development Permit and Variance.

She said it is staff's responsibility to also clearly and fully state the position of the Planning Commission. On September 18th the Planning Commission unanimously denied both applications and they based it on their findings that the development was not responsive to the Commission's request to move the house up to the 470-foot contour line. They found that the proposed home would impact the privacy of the adjacent neighbor. They found that when viewed from lower elevations, the subject home would have significant visual impacts and that the development will create a nuisance, hazard and enforcement problems within the neighborhood.

Regarding the variance, they felt there were no special circumstances concerning the subject property to warrant the variance and it would be a grant of special privilege which is not generally available to other properties in the vicinity. Therefore they did not wish to grant the variance, as well.

City Attorney Subramanian noted that one issue relates to Lot 66 which was legally created. The second issue is the Assessor's Office and how they make an independent determination on the value of the property. Third, is the request for a variance. She said Lot 66 was created through the subdivision process when the County approved Tract Map 533-2 in March of 1954.

The copy of the map is Attachment 12 of the packet and at that time, 30 lots were created. Based on this information, staff determined Lot 66 was legally created and it is referred to as a legal lot of record.

She said the Assessor is currently assessing the property as a residential parcel that is vacant and unbuildable. His determination is independent from the City and is not part of the Council's review of the property and of the project; however, the determination was done separately at the County Assessor's Office and is not taken into consideration for the City's purposes.

Councilmember Anduri questioned how it happened? Did someone had to apply for such status? Ms. Subramanian said staff did not investigate whether someone appealed a previous determination, which could be done or if the Assessor took into consideration easements or other issues on the property.

The third issue is the variance issue. There are easements that encumber the property; one is a trail easement that benefits the City and the public. Another is an ingress and egress easement that benefits private property owners. The issue came up before the Planning Commission when it reviewed the setbacks. Lafayette setbacks are customarily measured from the property line as well as from easements. Staff has not made a determination on the scope of the private easement, but out of an abundance of caution, staff recommended that the applicant voluntarily apply for a variance as it relates to the private easement and the potential setbacks because if the easement covers the entirety of the property, then one would need a variance for the setbacks. She said this is a voluntary request from the applicant.

Councilmember Federighi said she knows there is a great deal of dissention about whether or not there is a 50-foot easement or whether there is a lot line to lot line easement on the property. She questioned and confirmed with the City Attorney that she was unaware if the parties attempted in any way to quiet title. Ms. Subramanian said staff had made that recommendation initially, but neither party has sued as of yet to either quiet title or to bring an injunction to stop the City from processing it due to a lot line to lot line easement.

Councilmember Federighi questioned whether the applicant has title insurance, and Ms. Subramanian said she did not believe so, but that the applicant could address this issue. Councilmember Federighi questioned if setbacks were ever granted that basically took into consideration the entire lot, and Ms. Sinnette said no, not that staff is aware of.

Senior Planner Christine Sinnette described the item, reporting that before the Council was an appeal which has been timely filed by David Bowie on behalf of Lamorinda Properties. The Planning Commission denied without prejudice the hillside development and variance applications. The appeal is to be heard by the Council and reviewed as a new matter, and all pertinent information from the file as the result of previous hearings has been entered into the record, which she briefly described.

Because the property is vacant and in the Hillside Overlay District, it is subject to a two-phase development application. She said this is the first phase application consisting of determining the siting and massing of the proposed single family residence. If approved, the second phase application would consist of specific review of the house design and potential impacts associated with the development of the property. She said the Planning Commission has held five public hearings on the application and, at various times, has given direction to the applicant to reduce the size of the building, set the building further up the hillside, change driveway locations and consider alternative parking schemes.

Regarding moving the building further up the hill and providing site plans with driveways, the applicant did not specifically address the Commission's request to move the house to the 470 foot contour interval or reduce the square footage of the house until the meeting of September 4th. At that time, the applicant provided plans to the Commission which resulted in a 1,300 square foot home set at the 474 foot contour interval. He also indicated that he had no intention of building such a house for himself.

Ms. Sinnette said originally, staff had concerns with the size and massing of the development, the driveway locations, tree removal and impacts to the adjacent property, and had recommended several design changes occur. It was not until the applicant had reduced the gross floor area to 2,300 square feet and the height down to 30 feet and provided a single access to Sessions Road, as well as an attached two-car garage that staff recommended approval. The house plan also showed that portions of the building were at least 15 feet from the eastern property line and 19 feet from the adjoining structure. The Planning Commission ultimately denied the application on September 18th stating the application is not responsive to their comments and that there were significant visual impacts and impacts to privacy had not been minimized to the maximum extent feasible.

She said the project has been controversial, soliciting much public comment and correspondence. All comments and correspondence received from the public have been included in the staff report. In addition to stating opinions on the merit of the project, letters have included comments on the application and planning process, the legal status of lot 66, impacts to the trail easement, easements granted to property owners on Sessions Road and to those property owners in the Northridge subdivision, and geology and soils, drainage and existing redwood trees. All issues have been addressed one or more times by staff, the applicant or the City Attorney.

Since the Council is to consider this as a new matter, the staff report also contains an analysis of the currently proposed project based upon the plan submitted October 30th. They are slightly different from the project denied by the Planning Commission. The project the Commission denied was for a 2,312 square foot home with the building beginning at the 464 contour interval. The house being proposed now starts at the 463 contour interval and is 2,898 square feet.

She said the applicant is also requesting a reduction in the yard setback from the trail easement. The City applies yard setbacks not only from the property line but from any vehicular or pedestrian access easements. In this case, since the property has been determined to be a corner lot, there should be a 15-foot setback from the edge of the trail easement. The applicant is; however, asking for a reduction to 5 feet. Regardless of whether it is approved, the development as proposed will not have an impact on the trail easement.

Staff also determined through conversations with the Parks and Recreation Director and members of the Trail Subcommittee that the trail through the property is on the paved portion of Sessions Road, although the easement is 50 feet wide. The development being 15 feet from the edge of Sessions Road and at least 5 feet from the trail easement would not have any impact on the trail easement.

Staff is recommending the Council take public testimony, consider the recommendations of staff and the Planning Commission, and continue the item to December 8th.

Councilmember Andersson clarified with Ms. Sinnette that the September final submission to the Planning Commission was for 2,312 square feet and included the 473 square foot garage. The plan is now proposed at about 500 square feet larger.

Councilmember Anduri asked for an explanation of the variance request with respect to the ingress and egress easement. Ms. Sinnette said it is City policy that setbacks are not only applied from property lines but also from access easements. If there is a lot line to lot line easement that encumbers the entire property and we then have to place setbacks from the easement, there is no place to build. This is why the attorney is mentioning that out of an abundance of caution, if indeed there is a lot line to lot line easement, variances would need to be granted in order for something to be built on the property.

Councilmember Anduri asked if we were assuming that there is a lot line to lot line easement, and Ms. Subramanian said a determination has not yet been made, but they were for purposes of the variance request. Councilmember Anduri questioned the argument for granting this, and Ms. Subramanian referred to page 12 of the staff report and said staff feels this is a very unique situation in terms of the entirety of the lot being covered by the easement. It would not constitute a special privilege because the other properties in the vicinity currently contain a single family home on each of the parcels that surround it.

Mayor Anderson said there is a diagram in the report that shows a non-exclusive access reserve easement which indicates from lot line to lot line that the easement exists. He questioned whether staff was considering this to be valid going forward, and Ms. Subramanian said the company who did the marking is present tonight, but for purposes of the variance application, the Council is assuming that it does exist because of the setback issue. Staff has not taken an official position as noted in the staff report, but for purposes of making a variance determination, it is assumed this is the case.

Mayor Anderson said if this is the case, this would mean one could not build on the lot. He questioned if this then creates a special benefit to this particular lot by relieving it of that burden. Ms. Subramanian said the question of assuming whether the easement covers the entirety of the lot and whether you could actually build on it is something that will ultimately have to be addressed by a court. There is case law that indicates that one can utilize the property if it still allows for the dominant tenement; in this case, the parcels that have the easement for access, to continue to be able to access their property. So it becomes a legal argument that neither she, the Planning Commission or the Council can adequately opine on and a quiet title action would be the proper venue to make this determination.

Councilmember Anduri said in deciding what type of variance to grant, he asked where the measurement is taken from when discussing what setbacks exist. Ms. Subramanian said staff is assuming the easement covers the entirety of the property, so the setback is from its entirety. Ms. Sinnette said instead of looking at a prescribed setback as we would be from the trail easement, if the City were to grant a variance as recommended by the attorney, it would be phrased as setting minimum setbacks. So, if the lot line to lot line easement was not an issue at all, the front setback would have to be 20 feet. She said staff does not know what the determination is, and the variance is being phrased as a setback of 82 feet from the front property line. Staff would actually be setting what the minimum distances were rather than granting a variance from something, and it would basically be at a zero setback.

Councilmember Anduri clarified that the City Attorney is recommending granting the variance, because otherwise, there couldn't be a single family residence on the property. Ms.

Subramanian noted that if the Council does not grant the variance from the setback, assuming the entirety of the parcel is covered with an easement, staff would not be able to make that condition and then they would not be able to build any improvement because of the setback issue.

Mayor Anderson said then this would also grant the lot a special benefit from the variance which the finding states the Council is not supposed to do. He questioned how to resolve this conflict. Ms. Subramanian said this is why this is a unique situation, but it does not give a grant that other properties don't necessarily have, which is a single family home.

Councilmember Andersson said this is a private easement and enforceable by private parties. If a court determined that it is a lot line to lot line easement, he questioned whether the private parties would simply not enforce the easement and prevent any construction there. Or, he questioned whether this was something that would be determined by the court. Ms. Subramanian said the determination the court would need to make is, where the easement is, and if they were to assume that the entirety of the property could be covered, it is whether that easement precludes any other use of the property such as a single family home or another improvement.

Councilmember Andersson said if the easement is determined to exist and the court further determines that it therefore must allow for a buildable site, then the variance would take place. Otherwise it would become irrelevant. Ms. Subramanian said in some sense, this assumes that litigation would follow this.

Councilmember Federighi said she knows there is a grove of redwood trees and knows the soils engineer's report pointed out that the southern edge of the property had some past landslide activities, but she did not see any slide activity now. She questioned whether there was any discussion in the necessity for the retention of the trees for soil stability. Ms. Sinnette said there was some correspondence from the geotechnical engineer who is present and could speak on the matter.

The public hearing was opened.

Appellant:

David Bowie, Attorney representing Dick Holt of Lamorinda Properties, said the City Attorney properly indicated that the City does not get into the business of enforcing private servitudes, and it never has in all the years he has been associated with the City. The City Attorney has stated she is not sure of whether there is an easement for the entire property and is not ruling on this. He did research through record documentation that there is not a chance that the easement encumbers the entirety of the property. Further, assuming it was true, it would still be the case that they would have the right to develop because it would not be inconsistent with the right to use the easement. Law states that if you have a property which is subject to an easement, you as the owner of the dominant tenement, retain the right to use that property to the extent that it is not inconsistent with the use of the property by the holder of the easement itself. In this particular instance, they have testimony in the record from the civil engineer which makes it perfectly clear that no one can widen Sessions Road to the east. In addition, it is impractical to do so because it would take a tremendous amount of money to do that. Even if that property was subject to the easement which it is not, the property owner would still have the right to use that because it would not be inconsistent with the use of the easement.

In addition, there is case law which states that if an easement is unduly burdensome and you are preventing the effective use of property when you otherwise could use that property, and it is not required for use of an easement, then the easement is interpreted by the courts to be constrained and it is restricted back to what is really useable.

Mr. Bowie said to make their position clear, there is no way that the property is subject in its entirety to the easement. Therefore, it is a non-issue and this is not the City's dispute. The City is not in a position to make that legal judgment and therefore, he is asking the City to do what they are entitled to do for any lawful, legal lot--to build a home consistent with zoning. He said they do have a 50 foot easement for trail purposes and a setback is needed from that. In addition, he pointed out that there is a 50 foot easement as it extends north beyond the property line at Lot 66. So, if it is construed as a 50 foot easement, it is not a grant of special privilege because this is a physical constraint of the property which precludes them from using the property in the same fashion as everyone else has a right to use it.

Mr. Bowie noted the plan is only a siting and massing study. They have not even gotten to Phase II which is the architectural treatment of the proposal. The original plan they submitted in September was a habitable area of about 2,300 square feet plus garage for a total of about 2,800 square feet. The current plan re-submitted is about 2,300 square feet habitable plus the garage to bring it to 2,800 square feet. He said everyone has consistently agreed there is no way to build a home other than in the particular location they are proposing to build it. The issue is whether to build it in the proposed location or should it be pushed past the 474 contour line, as the Planning Commission had asked them to do.

They did a study that was submitted at the last meeting of the Planning Commission which indicated that they could build a 1,300 square foot home if they pushed above the 474 line. This; however, includes a garage. He said the habitable area is 849 square feet, which by no means is a livable home in today's world nor is it compatible with the neighborhood, and he felt this would be a complete taking, economically.

He said the current home is the same size or less than all of the other homes in the neighborhood. It is considerably smaller than homes up Sessions Road. The actual findings of the Planning Commission are that they have not limited privacy impacts to the extent feasible. He presented a photograph showing the actual property line. He said the adjoining home, which is the only one whose privacy is impacted in any fashion, is actually set back closer to the common boundary line than it should be, at 6 feet back. Staff said the nearest part of their structure is 21 feet to the north and 10 feet setback from the very end of the building, there are no windows at the end of the building and they have a garage structure past that. There is no way there is any impact on privacy of that location, nor if pushed 6 feet back would it create greater privacy than had already existed at the proposed level for the particular home. There is no basis to conclude there is any infeasible impact of privacy they have not attempted to address in some fashion.

Secondly, Mr. Bowie said it states there is a significant visual impact to views from lower elevations, and this is only being discussed for sections on Sierra Vista because you only see this particular home when you are right next to it on the two streets, which is not the intent of the viewing map nor is this the manner in which they propose to use it. Also, regarding not doing what the Commission asked them to do by pushing it up the 474 contour line,they did not because he questioned who would build a 849 square foot home.

The final issue had to do with the alleged nuisance and the physical impacts that exist on that site. There are no drainage swales on the site and no evidence of it. So, as a result, the finding by the Planning Commission was made up through error and it makes no sense. He said this is a project where there is no basis whatsoever for the City to turn down approval of a home on the property. He believed the Council should move to Phase II which will be for the Design Review Commission to attempt to review a feasible design amenable to everyone.

Councilmember Federighi said regarding the statement that there is no way the property is subject to a lot to lot line easement that would prevent this from being a buildable lot of record, she said there has been no quiet title action. She asked Mr. Bowie if his client had title insurance that would show that there is no lot to lot line easement. Mr. Bowie said the title insurance policy typically calls out an exception for various documents that appear of record and this is all it does. It states the bearer will be insured in fee title and the only exceptions to fee title are those listed in the schedule. He relayed a story about his personal property which had a reported exception of a roadway easement that was created by a tenant over property which the tenant did not even own. But, the tenant was an actual tenant in possession of the property at that time. The tenant purported to grant an easement to some adjoining property owners which showed up on his title. He objected to this title, and the title company suggested bringing on a quiet title action. Therefore, title insurance does not address this particular problem. He said a quiet title action would but it would be unreasonable to require Mr. Holt to sue all of his neighbors unless he has to.

Councilmember Federighi said it was mentioned this was the same submittal that the Planning Commission had. She questioned if the project denied was for 2,312 gross square feet including the 473 square foot garage, as the current request is for 2898 square feet including an attached 543 square foot garage. He said both projects had garages with them and both were about 2800 square feet.

Councilmember Anduri questioned if the difference of the proposal submitted on October 30 was 100 square feet, and what the Planning Commission actually reviewed. Mr. Bowie said the main intent was to preserve another trade and this was what was driving them, but he agreed to verify the square footage.

Councilmember Anduri questioned the significance of the argument that an 849 square foot house is not financially viable. Mr. Bowie said there is no impact that anyone can point to that would justify restricting a home to be built on this lot to that size, but the other aspect of it is that by the time the actual excavation, foundation, site improvements, garage and you actually build the home, you would end up with a market value less than the total cost of putting it together.

Councilmember Anduri believed that if the lot can be used, it is not a taking. And, the City does not guarantee a financial return on an applicant's investment. Mr. Bowie agreed, but said the Council is here to guarantee them objective and fair treatment, and he did not think granting and approving an 849 square foot home on the lot which meets all zoning requirements and is at least as large as lots in the area was fair or objective. Councilmember Anduri believed the test of whether it is economically feasible was not relevant to the discussion, and Mr. Bowie disagreed.

Councilmember Andersson said in looking at the Commission minutes from August 21st, he questioned what prompted the 474 contour line. He noted that in the minutes, Commissioner Lovitt commented that he walked the site and there was a 474 line where the issues of the project begin to get resolved. Then, later on in the meeting, Commissioner Curtin indicated it

would also save some trees and this was another reason. Commissioner Ateljevich also agreed. He said there was some rationale for the 474 line for privacy and preserving trees and he asked for Mr. Bowie to comment on this.

Mr. Bowie believed this was a faulty rationale. He presented a photo, stating the site climbs steeply to the rear of the existing home. The home he is talking about is 21 feet beyond the furthest back point. The homes are offset 21 feet further back, which is only the garage. When getting to the home itself, it is even further back than 21 feet and the windows on the east side are there for purposes of light and at a level of 5-6 feet high. This particular home's outdoor space is entirely to the east. In addition, the privacy impact is exacerbated by this home which does not meet the code requirements which they are attempting to meet. In addition, the living section of the home is actually 15 feet setback and not just 10 feet, and they meet all of the objective setback requirements in the context of privacy. He said frankly, if this house was too much of a privacy impact, then none of the other homes up and down the street should have been built because they are roughly the same parallel position to each other and they are much closer together. He argued that in this case, there is absolute privacy, but this is not the finding—it is to the extent feasible. He was not sure how the Council could justify jamming something up on a certain level on a hillside to say this is the only feasible way to build this home and not impact privacy which is the finding the Council must make.

Howard Martin, Civil Engineer, said he wrote a letter to Ms. Sinnette dated July 21st that discusses their firm's approach in looking at Lot 66. They prepared the parcel map for the adjoining subdivision which talks about easement 5296-OR-425 and he read that the meets and bounds description of Sessions Drive in the indenture between Western Title and Sessions started at the north line of Lot 66. He said it talks about being over lot 66 and further paragraphs talk about over a strip of land on Lot 66, not at Sessions Drive. The indenture allows for the right to describe an easement over the paved portion of Sessions Drive.

Regarding drainage issues, Mr. Martin said he had to do a previous watershed study to show what was happening with the water coming down Sessions Drive. He tried to show that it did not enter the parcel. In responding to a letter, he said there is a ditch which is not maintained and if plugged with debris, the water jumps the road and enters the lower portion of the parcel. His proposal would be to contain that and force it back into the roadway with construction of the asphalt berm. They have also proposed a pedestrian path along the side of the road which would provide a safer place for people to walk up the trail.

Mr. Martin said there is no water coming down through the top of the draw. There is some hillside flow from the side of the property which slopes in the parcel and then it works its way to the Schwartz' parcel below, but there is a high point at the very top part of the parcel. The flow is directly down the hill and with debris it could force it across, but it cannot enter the top portion of the parcel. The intent at the time was to push the water to the west side of the road and capture it in an inlet which frequently was plugged.

They also conducted a drainage study as part of the subdivision improvements for Jackovina showing that if this ditch were cleaned it would be adequate to handle the flow from the uphill development.

Mayor Anderson said he was concerned now that Mr. Martin pointed out the AC berm which reflects the water back onto the road and he asked whether this creates a potential hazard for people coming down the road or going up it. Mr. Martin said it will force it down and keep it from going under the lot. He said in looking at the contours, it should handle the flow on one side and

if the ditch is not maintained, it will plug and there will be flooding. If maintained and cleaned out, then it will stay on that side of the road. However, they are not forcing it across the street; the water will flow along the road and go into an inlet to a storm system.

Mayor Anderson questioned how this would change given the fact that no one is maintaining the ditch now. He believes the situation would occur and said he is not sure that once you get to the base of the road which is steep, there will not be a great deal of water which has left the ditch, gone along the berm and is in the roadway, which could be a hazard. Mr. Martin said they are not going to push the water back into the roadway. If the water jumps the ditch for any reason, it will go down the new berm and stay out of the roadway where it enters the existing curb at the bottom on Sessions.

Mitch Wolfe, Cal Engineering Geology, said to date they are not aware and have not found any geotechnical or geologic constraints that would preclude development on the property. He felt it was no different than developing any of the other properties in the neighborhood. From a geologic and geotechnical perspective, the site does not have significant constraints. Councilmember Federighi confirmed that this also included removal of trees.

Ms. Sinnette interjected, stating she was incorrect when asked earlier about the size. The size of the home the Planning Commission denied was 2,785 square feet and she neglected to add the 473 square foot garage. The current proposal is 2,898 square feet which is the full gross square footage, so the difference in size from the September and October plan is 113 square feet.

Public Comments:

LES HAUSRATH, Attorney representing Northridge and other homeowners, said he is an attorney retained by some homeowners to address legal concerns. Regarding whether the entire lot is encumbered by an easement or not, he is in complete disagreement with Mr. Bowie on this characterization and presented the subdivision and parcel map, dated May 1995, page 3, which states "non-exclusive access and utility easement" which shows the width of the entire lot. He said the map shows that the easement runs the entire width of the lot, distinguished from the trail easement, which is shown as 50 feet only. This is on the recorded map that is operative. He did not believe it was simply a private matter as the documentation is quite clear. He said uses are not just for access, but those that could be made by the uphill property owners, and Lot 66 was developed originally as the gateway to allow the upper lots to subdivide, that is why it is oddly configured, and it was never designed to be a developable lot. He said someone at the County concluded that the lot is not buildable and the bottom line is that the lot is encumbered with that easement. The deeds held by the uphill property owners contain the easement in the description that shows it is over, on or upon Lot 66. It is not just the 50 feet, but over and upon Lot 66. To answer Councilmember Federighi's question, Mr. Hausrath said it is a title policy and it shows the easements encumbering the entire deed of the lot.

Regarding the trail easement, it is 50 feet wide, it is a City easement, and was recorded in 1988. It is apparent that some use could be made of the easement area off of the paved area, as the street is winding and somewhat perilous. He believes the development inhibits and hinders the use of that easement by members of the public. Regarding buildable lot issue, the lot may be a legal lot, but this does not mean it is a buildable lot. He said size, location, topography and zoning guidelines must be considered to make such a determination. And he believed that the lot was one of the most constrained ever seen because it was set up as a lot not intended for

construction. The buyers knew what they were getting, and to come in and assume they are entitled to build whatever size of home they want because it is a legal lot is not right.

Another issue he said the Council should consider is the ever-changing applications and hearings. Staff is unable to ascertain the exact square footage of the new application, and this shows the problems with the lot and the entire attempt to shoehorn something on the lot. The Planning Commission noted many concerns that cannot be addressed, which involve fire safety and access, loss of trees, privacy, and stability of the land. He said neighbors have valid concerns and requested the City look at concerns and issues. He also disagreed this was not a taking just because the applicant does not want to build a small house. All issues together show why the Commission denied the request for the hillside permit and variance and why the Council should reject the appeal, as well.

Councilmember Anduri referred to the trail easement and that it not be encumbered, and he questioned and confirmed that Mr. Hausrath believed building within 5 feet was encumbering the easement, and that it is also not known to what extend the easement area overlaps the building area.

CAROL M. HEHMEYER said she used to live at 11 Sessions and spent hundreds of hours fighting the project. She said there is more than one original grant of easement and many of the owners have several original easements in their deeds and they are clear for over, under, around and through an access easement. The staff report defines the side of the house as a front door because a smaller variance is needed. She said the road is 28 degrees at some points on Lot 66 and it is really steep. If the road cannot be widened to the east, she questioned how a house could be built there.

MAEVE PESSIS, Lafayette Homeowners Council, said they sent a letter dated June 24th and wanted to highlight issues. She is the elected representative of the area that drains and is below the area on Sessions Hill in Valley View Estates. She said their Board continues to have concerns regarding several issues. Regarding removing 20 year vegetation, this provides a certain neighborhood of soils stabilization and mitigation for the considerable amounts of water that drain down through the slopes and rear gardens of Sierra Vista Way and Laurel Drive residents. She voiced concern about the adequacy of developed hydrology control mechanisms designed to channel the run-off as it appears to drain through the watershed neighborhoods. She repeated the privacy impacts of the looming height and mass issues and said the preliminary geotechnical report states that the map shows the property as being located on the lower portion of a large landslide deposit which extends upslope into the swale area along Sessions Road. She voiced concerns with landslides, slumping and stabilization. Also, she believes the application is in need of a CEQA review, more information is needed about soils, hydrology, geologic conditions of Lot 66 and the lower neighborhoods and it is difficult to believe that construction on neighborhoods below and above the site could be adequately mitigated.

KEN SARGENT said there are hundreds of pages of testimony, the Planning Commission investigated the project thoroughly and unanimously denied the application due to the basis and conclusion that it was undesirable from a public policy standpoint in the City of Lafayette to have the residence built. The Commission looked at safety, visual impact, the nature of the residence, and one is drawn to the conclusion that there is no possible way that this house can fit into its neighborhood and this is why many neighbors are present and unanimously opposed to it.

Councilmember Anduri asked if Mr. Sargent's position would change if the applicant had come in with an 849 square foot house proposal. Mr. Sargent said this would mitigate their feelings to

some extent and this is why the Planning Commission, out of concern for privacy and visual impacts of the house, kept pushing the house up the hill, as well as the need to save the trees. But there are a number of people who believe nothing should be built on the lot because it constrains them from doing something with that piece of property to make the entrance to their housing development more attractive in the future.

Councilmember Anduri asked if anyone ever approached the owner of the property to offer to purchase it to make such improvements, and Mr. Sargent said no; he believed that they already regarded their ability to make those improvements as guaranteed to neighbors through their deeds.

SUE PITCHFORD asked to review her husband's letter which mentions he tried to purchase the lot from the owner in the 1960's without success.

JEFF SCHWARTZ said his home was there prior to any subdivision and this is why it is close to the property line. He said the proposal tries to construct a house on a 6,000 square foot portion of the lot in a corner right next to his home. It looks into all of his bedrooms and his backyard and blocks all of his western light. In the past when the project was originally proposed, the owner tried to put a kiosk and a gate and part of subdivision requirements required curb and gutter, a 4 foot retaining wall, and a sound wall when they eliminated the water meter and said it was not a buildable lot. He said the lot is not a buildable lot on record back through two different subdivision processes, and the economic opportunity is that the owner used his economic opportunity when the lot was originally purchased to put a road on it. So, he had the option to put a road or a home on it, and therefore has had its economic opportunity already 10 years ago.

Councilmember Andersson asked what bedrooms were affected by the proposal, and Mr. Schwartz pointed them out on the map and said all of the proposal's bedrooms look right into his backyard and into all of his bedrooms. Regarding blockage of light, Mr. Schwartz acknowledged that the house is moved up somewhat, but it would still block sunlight.

JON SPIELER said they submitted a letter regarding safety issues, spoke of the history of Sessions Road and said in 1997, the owner asked neighbors for their support in subdividing the parcel into a total of 4 parcels. The parcels were to be given the same easement rights over lot 66 which appear in all of their titles, and which Mr. Holt was well aware of. In the granting of the easement rights, the owners received economic gain from Lot 66. When the owner died, his beneficiary acquired Lot 66, she was a good friend of E.G. Craig who was convinced he could build another home due to Mr. Holt's position as a Planning Commissioner. Lot 66 has an appraised value of approximately $20,000 and it was gifted to them by Petar's beneficiary. Petar knew that Lot 66 was unbuildable, and this was further clearer when the hiking trail was donated to the City with public access over Lot 66. Lot 66 is and has been unbuildable and he does not understand what right the City has to overturn the long-standing determination.

CAROLDEAN SHINNICK pointed out on the map the location of her house, and said there have been times where cars have ended up in her yard due to her home being at the split on Sessions and voiced concerns for safety.

LAKSHMAN WATAWALA said his primary concern is safety of the area when the house is built. The road is extremely steep, it winds down to a blind corner on Sierra Vista Way, and the City traffic engineer could not place the driveway to the house from Sessions Road because it was too steep and therefore placed it on Sierra Vista Way. But, the Fire Department determined this

was not acceptable. Regarding granting of the easement, the economic benefit of the lot has already been derived and the economic benefit should be proportional to the price of the lot. He presented photographs of the steep roadway, said trucks bottom out and get stuck, and the only way to get out is over Lot 66.

ALLAN HOULBERG described where he has lived since 1956 on Sierra Vista Way, spoke of drainage problems over the years, said the neighborhood consists of 1800 to 2200 square foot single story ranch houses, and the proposed house will be a monster house that does not fit into the neighborhood. He said the redwood trees help stabilize the hill and questioned how 23 trees could be removed, and an 849 square foot house would be adequate for two people living there.

JEFF HARMON said his property sits on the knoll that overlooks Lot 66, said trees were planted in the swale to provide screening, valuable watershed and hill stability. The hill has suffered numerous landslides and said the tree planting was an original condition of approval. He believes the applicant is trying to circumvent the rules governing responsible development and if approved, the owner will receive a tremendous windfall at the cost and expense of all neighbors above and below, as well as hikers accessing the trail. He believed if the rules are circumvented and the project approved, it would make this a de facto unbuildable lot which is what the County has always classified it. As chair of the Planning Commission, he felt Mr. Holt knew better than anyone that the property was easement burdened and building constraints would apply. Therefore, any granting of variances to enable the project would constitute a matter of special privilege that would not be generally available. There are no special circumstances that would warrant a variance. The applicant should be held to the letter of the law and he asked the Council to reject the proposal with prejudice.

Councilmember Federighi referred to trees planted to provide stability and asked if this was a condition of approval for the Northridge development. She questioned staff as to the validity of the requirement. Ms. Sinnette said when this was raised by the Planning Commission, she searched through the project file, found the Council resolutions for both the preliminary development plan and final development plan, and there was nothing that mentions landscaping on Lot 66 from a total of 40 conditions of approval. Mr. Harmon said he also searched through the project files, and he found a condition referring to "downstream erosion control plantings" on the landscape plan, the plans of which are now mysteriously absent from the file.

NED ROBINSON urged the Council to deny or indefinitely postpone the application because the Council is putting the cart before the horse. He spoke of his experience of land use issues and said he never has seen a City or County willing to take on the planning of a project until legal issues are resolved. He agreed that the City should not enforce easements, but should recognize easements and he believed that the easement is all of Lot 66 for pedestrians, vehicles and utilities without exception. He contacted the Assessor's office who told him the assessment was greatly reduced due to the easements across the property, and urged the Council to deny the application until the legal issues are resolved, as every deed has the lot line to lot line easement with no exceptions.

Councilmember Federighi questioned whether a decision could be postponed until a legal issue is resolved, and City Attorney Subramanian said she would not recommend this because it is a private easement issue and private matter, so unless there is quiet title action or injunction, she recommended moving forward on the item. If a private title action were filed, this might be more relevant to continuing the matter.

Councilmember Anduri said the attorney for several of the homeowners took the position that jurisdictions "can't just say that's a private matter" when it is a recorded easement, and he questioned the City Attorney's position on this. Ms. Subramanian said the easement is private and it is not a public easement that is for the benefit of the City or the public that the Council would want to enforce. She also said the private parties do have remedies in order to address this issue.

WING CHIN said Northridge Park consists of 13 homeowners developed back in 1980 and affirmed all 13 homeowners oppose the development.

Rebuttal – Applicant

David Bowie said he agrees that the City should not get involved in private disputes over easements. He is willing to acknowledge an easement and the issue is the extent of the easement and its impact upon this development. The interpretation of that is an interpretation of private remedies and private rights and this is not something the City ever gets involved with. What the Council's charge is to apply the City's rules on this lot in an objective, reasonable fashion and he is not trying to take advantage of any loopholes. Regarding the comment about the Northridge subdivision requiring all trees be planted to stabilize the property, it would be highly unusual if the application for subdivision of property required that improvements and planting take place off the subdivision site, and he suggested that Ms. Sinnette's research is correct. Also, the attorney for the neighbors said the easement covers the entirety of the property, but MLS 502-94 is the same situation—it is a subdivision of property that has nothing to do with Lot 66. However the Council interprets MLS 502-94, it does not make any difference what that is because it does not impact the property as Lot 66 was not part of that. In addition, no one has bothered to look through the records but he did and found a map dated 1953 which is one of the original maps having to do with La Canyada Park, Unit No. 2 which is the subdivision which created Lot 66. Mr. Schwartz's home is excluded from this subdivision, and nothing in Lot 66 indicates that it was burdened by anything other than the same incidence of ownership and creation that all the other lots in that subdivision would have had. There is nothing about Lot 66 that would limit it in some fashion. He referred to his May 29 letter and said he summarized the exact process by which the easement was created, and he is satisfied that his legal position is sound on at least three different basis one of them being that there in fact was no easement across the entirety of the lot because the indenture that created this got rid of all the easements and then went back and created a new easement which became Sessions Road. It did not incorporate the entirety of the lot and has always been referred to as a strip of land. He said someone else outside the chain of title might have done a further grant deed, but in tracing title, he finds there is no limitation in terms of the easement rights themselves.

Also, he pointed out that Sessions Road cannot be widened to the east for physical reasons of steepness. If the Council listens to the City Attorney's advice which is to ignore the issue about the easement, they are at a massing of building studies, everyone agrees it must be on the east side of the Sessions Road portion of the lot, it must be located between 464 and 474 contour line, and the final size of the home is consistent and compatible with the entire neighborhood. He said the only issue before the Council is the 464 or 474 line, and the only justification for moving it to 474 is that there is someone impaired with privacy. He said because the homes are not lined up parallel, it is physically impossible for there to be an impact of light and air by this structure. He also stated they have created windows that are for light purposes only, that there is a 21 foot separation in terms of vertical distance north to south, they meet the actual setback requirement and the habitable portion of setback is at least 15 feet off the common boundary

line. Privacy is supposed to be protected to the extent feasible, and he did not understand how they have not done this.

Lastly, Mr. Bowie said City staff has done a good job in a very difficult situation which is highly, politically charged to give the Council the evidence upon which to make a decision. They are not asking for anything special, but fairly and objectively treated the same as anyone, and Mr. Holt has a lawful legal lot, we have a defensible position on the easement issue but it is not something the Council needs to wrestle with. He said the only privacy impact is on one single lot and we are asking for a size of a home that would ordinarily be approved without any controversy whatsoever. He thinks they are entitled to what they are asking for, he thinks they should be sent to the Design Review Commission to work on a design that will even more mitigate impact. And, there are also 9 potentially impacted trees. Of those 9, 5 are listed in poor condition. The rest are listed in fair condition. In addition, they are required to mitigate by planting 74 or more additional new trees. He asked the Council in fairness to reverse the Planning Commission determination and send them to the Design Review Commission.

Councilmember Anduri questioned the difference between the two submissions of design, and Mr. Bowie said he was not sure but his understanding was that there was an attempt to preserve one more tree and it is not clear where it is, but 100 square feet is minimal. He said if it is a big issue, they will cut the 100 square feet out of the plan.

Councilmember Anduri asked what the difference was from the top of the Schwartz's house to the highest elevation of the proposal. Mr. Bowie said there is a change in grade, but the height of the home is 30 feet. Mayor Anderson said the floor level is the difference between 495 to 453, and Mr. Bowie guessed it would be approximately 15-20 feet.

Mayor Anderson closed the public hearing.

Councilmember Federighi said one issue to address is the house being story poled, which it is not currently, and she asked for this to be done. Ms. Sinnette said story poles were done twice; the meeting of July 3 there were story poles representing a 3300 square foot home. The story poles were revised for the September 4th meeting to reflect the 2785 square foot home. The remnants there now reflect the 2785 square foot home that the Commission denied, and there is a slight difference in the location.

Councilmember Federighi said she did not ever remember seeing a lot quite so constrained as this, and noted she was on the Planning Commission for six years and the City Council for 9 years.

Councilmember Andersson said he has seen more constrained sites, said one of the key questions regarding the level of the house is the privacy issue, and he thanked Mr. Schwartz for identifying those issues. He believed these are things that could be mitigated through landscaping and fencing.

Councilmember Anduri said the Council is not deciding the exact landscaping or anything about the design of the house; just trying to determine if it is feasible to develop something that will meet the requirements. He said it is possible that when the applicant comes back with detailed designs, it might not be sufficient. Ms. Sinnette acknowledged this possibility, stating this is step one of a two-step process that is defined in the zoning ordinance. They are separate applications and processes that go through their own set of design review standards and public hearings. She said the Council is seeing a level of design not often seen at the siting and

massing stage. She questioned whether this is the best location and general size to site a home if there indeed is a home to be sited. If this decision is made, then the applicant will move onto phase 2 where the City will review specific design and mitigations.

Councilmember Federighi said she realizes this is a voluntary request for a very large variance that would basically exclude most of the lot and she asked the question of staff whether this type of request had ever been granted, and the answer was no. Variances had been granted for 5-10 feet dependent upon the characteristic of a lot, but she believes it would be difficult to come to the conclusion that a grant of a variance of this magnitude would not be a grant of special privilege. She suggested the private parties obtain a legal determination on the issue.

Councilmember Andersson said given the uncertainty about the easement over the whole property, he was uncomfortable with granting a variance to negate that easement. He felt it was something to be settled outside the Council's jurisdiction. If it is settled and it turns out there is no easement, then there is no issue. But, if there is an issue, the matter should be best taken up at that point.

Councilmember Anduri said he was having a difficult time reconciling advice that the Council ignore the easement and on the other hand, consider a variance that assumes the easement.

Mayor Anderson agreed and said he was not sure how it would be resolved and believed it would be difficult to make findings of no special benefit when there is such an unusual variance. He believes this makes it very difficult for the Council. He suggested the story poles be reset or set for the proposed envelope to clearly see its relationship to the adjacent home and how it fits on the lot, as well as the affected trees. With this information, he believed this would help the Council as to how to proceed. He also believed story poles would be helpful.

He believed that the question of mitigating the privacy issue is a phase 2 item and something to be addressed in the actual design. There is still concern regarding the variance and the easement, and it seems contradictory to the City's process.

Councilmember Anduri noted that one of the Planning Commission's reasons for denial was visibility, and he questioned if this related to hillside issues, and if so, what is the argument for this. Ms. Sinnette said Sierra Vista and Sessions Road are both on the City's viewing evaluation list and staff is supposed to analyze views from locations on the list for properties located in the Hillside Overlay District . The Planning Commission felt that this home, in light of views from those two streets, was significant. Staff has generally reviewed the list as criteria more for significance from off-site views so staff did not feel that this particular aspect was significant. She noted that there are homes on Sierra Vista that are visible, but the Commission did feel it was a significant impact to those two public viewing locations.

Councilmember Federighi felt there was value in story poling the property. Mayor Anderson said Mr. Bowie addressed this by his statements of being able to see every house on Sierra Vista but he did not believe it was applied correctly by the Planning Commission. He also agreed the story poles would be helpful in understanding the position of this envelope.

The Council unanimously agreed that story poles should be erected.

ACTION: It was M/S/C (Andersson/Federighi) to accept public testimony, consider the recommendations of the Planning Commission, and continue the item to the December 8, 2008

City Council meeting. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent: Tatzin).

11. CONSENT CALENDAR

ACTION: It was M/S/C (Federighi/Andersson) to approve Consent Calendar Items 10A, B, C, D, E, F, and G. Vote: 3-0-1-1 (Ayes: Anderson, Federighi, Andersson; Noes: None; Abstained on Item 11A: Anduri; Absent: Tazin).

A. **City Council Minutes**
October 27, 2008
Recommendation: Approve.

B. **Agreement relating to maintenance of existing landscaping between property owners, Scott Braunstein and Lulu Braunstein and the City of Lafayette, for property located at 1261 Redwood Lane. APN 242-060-021**
Recommendation: Accept agreement relating to maintenance of existing landscaping and authorize the City Clerk to record.

C. **Community Park Children's Play Area Project – revised cost estimate from $248,475 to $334,000**
Recommendation: Revise the 2008-2009 Budget to reflect the revised cost estimate and authorize staff to move forward with bids and construction.

D. **E-mail dated October 22, 2008 from Earl Piermattei resigning from the Capital Projects Assessment Committee.**
Recommendation: Accept resignation.

E. **Review and comment on October 9, 2008 Central County Action Plan for routes of Regional Significance**
Recommendation: Forward comment letter to TRANSPAC.

F. **Resolution 2008-45 establishing City Manager Salary Range and City Manager's Salary**
Recommendation: Adopt Resolution 2008-45.

G. **Resolution 2008-46 approving the City Manager Employment Agreement**
Recommendation: Adopt Resolution 2008-46.

12. COUNCIL/COMMISSION REPORTS

A. **Councilmember report on activities and consideration of matters a councilmember wishes to initiate for placement on a future agenda.**

Councilmember Federighi said the Council had previously discussed looking at alternatives of contracting with the County for police services. She questioned when a report on alternatives could be scheduled. City Manager Falk said staff has not yet begun the project. The Council allocated funding for this fiscal year, he met with the City Managers of Danville and Orinda and the three cities will contract with a single consultant to capitalize on one database as well as other options. He said the Town Manager of Danville made it clear that he was not going to do any work on the study until after the election. Staff has been gathering information, they had two lunch meetings to discuss available consultants, and staff has drafted an RFP.

Councilmember Anduri questioned the date for the Blue Ribbon Committee, and Ms. Robinson noted this item would come before the Council at its first meeting in December. City Manager reported that Orinda would be hold a workshop to unveil their report on November 12, 2008 and staff would be attending this meeting.

Councilmember Andersson reported that the AB 32 Climate Change Task Force have been meeting monthly and working on technologies and job creation. He said he may be the only local City official and said they are looking for two more participants.

Mayor Anderson reported on the Mayors Conference, stating there was a presentation from MTC on lowering CO_2 emissions from transportation sources to meet the goal of emission standards. City Manager Falk added that they made it clear that they do not believe under any scenario that we can meet emission reduction goals without dramatic change in the way land use is planned in the Bay Area. Councilmember Andersson said what is clear is that there is not serious quantification of how we get to the goal, and the message is to do all of them, and it is not clear how much land use accounts for this.

Councilmember Federighi reported attending the Planning Commission meeting to listen to the Senior Affordable housing project, which was well received by the Commission. The issue of increased density, height, visibility, and there was no one voicing concerns. The Senior Housing Task Force met prior to the meeting and unanimously recommended that a roofline be sloped rather than a more urban look which the Design Review Commission had asked Eden Housing to design. The Design Review Commission reviewed the drawings and they felt that it should look less residential and preferred the original look.

13. WRITTEN COMMUNICATIONS

A. **Letter dated October 23, 2208 from Kathryn Kavanagh, Community Liaison for Hospice Foundation of the East Bay, requesting police assistance with street closure at Mt. Diablo Blvd. at Lafayette Circle East for the Annual Tree of Light ceremony on Sunday, December 7th at 5:30 pm.**
   Recommendation: Discuss and direct staff.

ACTION: It was M/S/C (Federighi/Anduri) to approve the street closure at Mt. Diablo Blvd. at Lafayette Circle East for the Annual Tree of Light ceremony on Sunday, December 7th at 5:30 pm. Vote: 4-0-1 (Ayes: Anderson, Anduri, Andersson, Federighi; Noes: None; Absent: Tatzin).

14. ADJOURNMENT

The City Council adjourned at 11:20 p.m. to the next regular meeting on November 24, 2008.

APPROVED:

_____
Mike Anderson, Mayor

ATTEST:

_____
Joanne Robbins, City Clerk